No. 18-315

In The
Supreme Court of the United States

COCHISE CONSULTANCY, INC.
and THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA
ex rel. BILLY JOE HUNT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

The question presented is whether a relator in a False Claims Act *qui tam* action, representing the United States as the real party in interest, may rely on the statute of limitations in 31 U.S.C. § 3731(b)(2) in a suit in which the United States has declined to intervene and, if so, whether the three-year limitations period in 31 U.S.C. § 3731(b)(2) begins to run from the date of the relator's knowledge of the alleged false claim, or from the date of the responsible Government official's knowledge of the alleged false claim.

PARTIES TO THE PROCEEDING BELOW & RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Respondent Billy Joe Hunt is an individual without any corporate status.

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OPINIONS BELOW

The court of appeals' opinion is reported at 887 F.3d 1081. Pet. App. 1a. The district court's opinion is available at 2016 WL 1698248. *Id.* at 32a.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2018. On June 28, 2018, Justice Thomas granted an extension of time for filing the petition for a writ of certiorari until September 8, 2018. No. 17A1390. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

31 U.S.C. § 3731(b) provides:

(b) A civil action under *section 3730* may not be brought—

(1) more than 6 years after the date on which the violation of *section 3729* is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after

> the date on which the violation is committed,
>
> whichever occurs last.

The False Claims Act, 31 U.S.C. §§ 3729–3733, is reproduced in full in Appendix C to the petition. Pet. App. 41a.

INTRODUCTION

Congress enacted the False Claims Act ("FCA") 150 years ago with one central objective: Stopping procurement fraud and reclaiming ill-gotten gains for the public fisc. Indispensable to the FCA is the relator: A watchdog, informer, investigator, and prosecution partner in achieving that goal. Incentivized by a share of the recovery, the relator can ferret out wrongdoing when the Government's investigatory and prosecutorial resources are insufficient to the task.

For the FCA to work the way Congress intended, the same statute of limitations must apply to the Act's private and public partners. And that is how the law is written. Petitioners would vitiate this symmetry by having private party claims governed by a shorter statute of limitations than government-brought claims—an outcome unsupported by the text of the statute and contrary to the FCA's policy of maximizing the recovery of stolen public funds.

Prior to 1986, the FCA had a six-year statute of limitations, which applied to all parties, both the

Government and relators. 31 U.S.C. § 3731(b)(1). In 1986, Congress extended the statute of limitations up to ten years in situations where the Government learned (or should have learned) of a potential claim, so long as it acted within three years of that knowledge. The expanded limitations period was specifically designed to attack concealed fraud, and can work to defendants' benefit if no claim is brought within the three years following the fraud's discovery.

Petitioners would take away this discovery rule from relators by reconstruing § 3730(b)(2) as applying only to the Government. This Court should reject Petitioners' statutory redrafting and give effect to Congress's words as written. Not only do Petitioners propose their own statutory amendments, they invent a new interpretive canon—the doctrine of "counterintuitive results"—for statutory results that while not absurd, are potentially unfavorable to them. Petitioners decry often far-fetched hypothetical outcomes that are bad for fraudulent actors, but not counter to the FCA. Meanwhile, Petitioners' reading of the Act would render provisions meaningless or incompatible and would elevate legislative history above statutory text, while turning statute of limitations default rules on their head.

In short, Petitioners advance an untenable interpretation of the FCA that creates a two-tier system with the Government and relator claims subject to different statutes of limitations. The FCA's literal text,

however, puts relators and the Government on equal footing when it comes to bringing suit.

STATEMENT OF THE CASE

A. The History and Purpose of the False Claims Act.

The FCA is the Government's most powerful weapon against fraud. Since its enactment more than 150 years ago, it has been used to stop "massive frauds" perpetrated by Government contractors. *Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016) (internal citation and quotations omitted). With the Act's 1863 creation,[1] Congress "impos[ed] civil and criminal liability for 10 types of fraud on the Government, subjecting violators to double damages, forfeiture, and up to five years' imprisonment." *Id.* Recognizing that the executive branch's investigative and enforcement arms are not equipped to discover and redress every instance of procurement fraud, Congress created a statutory scheme that provided three primary avenues of litigation: Government-initiated actions, intervened relator-initiated actions, and declined relator-initiated actions. *Vt. Agency of*

[1] As the Court has observed, and as pertains to this case, "Wars have often provided exceptional opportunities for fraud on the United States Government." *Kellogg Brown & Root Servs. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1973 (2015) (internal citations and quotations omitted). President Lincoln signed the FCA into law "to combat rampant fraud in Civil War defense contracts." *Id.*

Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 769 (2000) (citing 31 U.S.C. § 3730(a)–(b), and describing these three actions).

1. Rights of Parties to Relator-Initiated Actions.

If the Government chooses to intervene in the relator-initiated type of FCA suit, "it assumes primary responsibility for prosecuting the action," *Vt. Agency*, 529 U.S. at 769 (describing § 3730(c)(1)), and gains particular procedural accommodations and devices, *see* 31 U.S.C. § 3731(c) (describing filing- and amendment-related procedures for intervened relator-initiated actions). The relator likewise gains particular rights and procedural protections: Congress directed that the relator "shall have the right to continue as a party to the action," § 3730(c)(1), subject to a limited number of actions the Government may take to control the lawsuit or the relator's participation in proceedings. *See* § 3730(c)(2)(A)–(B) (giving the relator the right to receive notice and hearing before the Government dismisses the case, and mandating judicial determination of reasonableness before settlement for all intervened relator-initiated FCA suits); § 3730(c)(2)(C) (providing four limitations a court may impose to restrict relators' participation in intervened actions).

However, if the Government chooses *not* to intervene—the last type of FCA lawsuit—the relator then has the exclusive right to conduct the action, § 3730(b)(4), and the Government may subsequently intervene only

on a showing of "good cause," § 3730(c)(3). *See also Vt. Agency*, 529 U.S. at 769. Regardless of the Government's intervention decision, the False Claims Act gives its *qui tam* relators the same status as if the Government itself had brought the suit. *Id.* at 772–74. The United States remains the real party in interest, however, even when it opts not to intervene. *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 930 (2009); *see also* 31 U.S.C. § 3729(b)(1).

Congress further stimulated relator-driven suits through a number of incentives provided in the FCA's text. Relators are encouraged to come forward by statutory provisions granting them fifteen to twenty-five percent of the recovery in intervened cases, § 3730(d)(1), and twenty-five to thirty percent of the recovery in declined cases, § 3730(d)(2). These recoveries are substantial and "essentially punitive in nature": the Act provides for treble damages, plus civil penalties of $11,181 to $22,363 per false claim submitted. *Escobar*, 138 S. Ct. at 1996 (quoting *Vt. Agency*, 529 U.S. at 784); 31 U.S.C. § 3729; 15 C.F.R. § 6.3(3) (2018) (adjusting penalties for inflation). "[T]he relator's bounty is simply the fee he receives out of the United States' recovery for filing and/or prosecuting a successful action on behalf of the Government." *Vt. Agency*, 529 U.S. at 772 (citing 31 U.S.C. § 3730(b)).

The Act was carefully designed to screen relators to ensure that they are providing novel information that meaningfully aids the Government in prosecuting and remedying fraud without unduly burdening defendants. A relator must be an "original source" of the

information contained in the fraud allegations. In that role, the relator must have either "voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based" prior to public disclosure of such information or possessed "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action[.]" § 3730(e)(4)(B). Relators are also subject to a public disclosure bar, under which courts must dismiss actions based on allegations disclosed in prior Government lawsuits, hearings, investigations, or in the media. § 3730(e)(4)(A). Finally, relators are constrained by the first-to-file bar, which ensures that only the first relator to file a lawsuit on the basis of a particular set of fraud allegations may proceed with an FCA action and share in any recovery. § 3730(b)(5). Taken together, the statutory incentives and bars encourage a race to the courthouse by the relator possessing the best knowledge of the fraud and the greatest capacity to aid the Government in recovering fraudsters' ill-gotten gains, while preventing opportunistic lawsuits and shielding defendants from redundant litigation.

2. Amendments to the FCA.

The amendment history of the False Claims Act demonstrates the crucial role of relators in exposing and prosecuting fraud. The FCA was originally passed in 1863 to combat Civil War procurement fraud, *see*

Escobar, 136 S. Ct. at 1996 (citing *United States v. Bornstein*, 423 U.S. 303, 309 (1976)).

Intervening amendments designed to restrict *qui tam* lawsuits, *see* 31 U.S.C. § 232(C) (1946), proved disastrous, enabling rampant fraud and thus eviscerating Congress's longstanding design for the FCA. *See* Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 343 (1989) (describing the "period of desuetude" in which the FCA *qui tam* languished before 1986). For example, the Senate found that in 1985 alone, "45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses," and cited Department of Justice estimates that fraud against the Government represented one to ten percent of the total federal budget. S. Rep. No. 99-345, at 2–3 (1986). Rather than abandoning the *qui tam* to the dustbin of history, Congress acted decisively to reenlist the relator as one of the Government's tools against such sophisticated frauds.

The 1986 amendments reinvigorated the False Claims Act's *qui tam* provisions. Among a suite of changes empowering relators and expanding the reach of FCA liability, Congress intentionally extended the statute of limitations. Previously, the Act had provided a flat, six-year statute of limitations. However, in 1986, Congress added a discovery rule, *see* 31 U.S.C. § 3731(b) (1988), providing that an FCA action may also be brought no "more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the

circumstances, but in no event more than 10 years after the date on which the violation is committed." 31 U.S.C. § 3731(b)(2). Congress also lowered the burden of proof, 31 U.S.C. § 3731(c) (1988); removed the specific intent requirement, 31 U.S.C. § 3729(b) (1988); increased the incentive available to relators from twenty-five to thirty percent of the recovery, 31 U.S.C. § 3730(d)(2) (1988); and established the *qui tam* procedures now codified in 31 U.S.C. § 3730(b)–(c), enabling relators to bring FCA suits—and continue those suits even after the Government declines to intervene. *See, e.g.*, § 3730(c)(2)(D)(3) (1988).

Congress further amended the False Claims Act in 2009, reinforcing the provisions and aims of the 1986 amendments. Charles Doyle, Cong. Research Serv., R40785, Qui Tam: The False Claims Act and Related Federal Statutes 8 (2009), available at https://fas.org/sgp/crs/misc/R40785.pdf ("The amendments of the Fraud Enforcement and Recovery Act of 2009 reinforced the 1986 amendments, particularly in instances where judicial developments evidenced a need for clarification.").

B. The Parsons-Cochise Bid-Rigging & Bribery Scheme.

Petitioner, The Parsons Corporation ("Parsons"), is an engineering, construction, technical, and management firm that provided services under contracts with the United States Government during the Iraq and Afghanistan wars. Pet'rs' Br. J.A. 26a ¶ 20, 19a–21a. At

issue here was the $60 million U.S. Army Corps of Engineers Parsons Prime Contract for Coalition Munitions Clearance ("CMC Contract"), Pet'rs' J.A. 33a–34a ¶ 47, by which the Government arranged for cleanup of excess munitions discarded by enemy troops. Pet'rs' J.A. 24a–25a, 26a ¶ 20; Pet. App. 3a. Parsons solicited and received multiple subcontract bids in response to its February 4, 2006 Request for Quote ("RFQ"). Pet'rs' J.A. 35a ¶¶ 55–57. Petitioner Cochise Consultancy, Inc. ("Cochise"), Pet'rs' J.A. 26a ¶ 22, was not among the security services subcontractors eligible to participate in bidding for that RFQ. Pet'rs' J.A. 36a, ¶¶ 60–61. In spite of its non-inclusion in the bidding pool (due to Cochise's failure to provide proof of insurance, Pet'rs' J.A. 36a ¶ 60), Cochise was named as subcontractor for CMC Contract security services on February 21, 2006. Pet'rs' J.A. 27a ¶ 26, 35a ¶ 54 (Parson's Task Order, "Cochise Subcontract"); Pet. App. 4a–5a (describing alleged bid-ridding scheme); *accord* Pet'rs' J.A. 36a–40a (factual allegations in support of bid-rigging scheme).

Respondent Billy Joe Hunt is a former Parsons employee who managed the CMC Contract's day-to-day operations in Iraq. Pet'rs' J.A. 24a–25a ¶ 17; Pet. App. 3a. His complaint, Pet'rs' J.A. 6a–47a, alleges that Parsons and Cochise engaged in a bid-rigging and bribery scheme that charged the Government for security services on the CMC Contract at grossly inflated rates, including charges for services that were not provided at all. Pet. App. 3a–5a; *see also* Pet'rs' J.A. 19a–22a

¶¶ 1–9, 38a ¶ 72 (describing one instance of non-performance involving a vehicle paid for but not received).

Cochise remained the subcontractor until the end of September 2006, Pet'rs' J.A. 40a ¶ 80; *accord* Pet. App. 5a, when bidding was reopened and the CMC security subcontract was awarded to another company, ArmorGroup. Pet. App. 5a; Pet'rs' J.A. 27a ¶ 25.

Indeed, ArmorGroup initially won the subcontract through the February 2006 RFQ process. Pet. App. 3a, 5a; Pet'rs' J.A. 27a ¶ 25. Cochise, however, circumvented that bidding process through inducements and bribes, including at least one expense-paid trip, Pet'rs' J.A. 20a–21a ¶ 4, that allegedly operated as an illegal gratuity. *Id.*; *see also* Pet'rs' J.A. 35a–38a (describing subtleties of the scheme).

Cochise allegedly directed its agents to persuade an Army Corps of Engineers Officer, Wayne Shaw, to participate in the scheme. Pet'rs' J.A. 37a–38a. He, in turn, ordered Parsons employees (including Mr. Hunt) to rescind the bid award to ArmorGroup, on a fraudulent basis, and instead circumvent the bidding process and award the contract to Cochise, all the while attempting to conceal the kickback scheme. Pet. App. 3a–5a; *accord* Pet'rs' J.A. 37a–40a. When Parsons employees initially refused to participate in the scheme as ordered, Mr. Shaw forged documents to fraudulently issue the rescission directive. Pet. App. 4a; Pet'rs' J.A. 38a ¶ 69. Mr. Hunt was the only witness to this forgery, Pet'rs' J.A. 38a ¶ 69, and this and other instances of

fraudulent conduct went undetected by the Government.

Cochise's subcontract cost the Government at least $1 million more per month between February and September 2006. Pet. App. 5a; Pet'rs' J.A. 40a ¶ 79 (comparing month-on-month charges against ArmorGroup's duly awarded bid price). Petitioners' scheme thereby defrauded the Government of an estimated minimum of $6–7 million from the inflated contract price alone. *See* Pet. App. 5a; Pet'rs' J.A. 40a ¶ 79. Additionally, the scheme imposed on the Government approximately $2.9 million for fraudulently purchased armored vehicles for Cochise that ArmorGroup already had, and would have provided at no additional cost as part of the subcontract. Pet. App. 5a; Pet'rs' J.A. 40a ¶ 79 (alleging excess charges to the government).

Officials of the Government first learned about the nearly $10 million CMC Contract scheme when FBI agents fortuitously interviewed Mr. Hunt on November 30, 2010 regarding a separate bid-rigging scheme. Pet. App. 5a. The Government did not file an FCA suit in response to this information, but Mr. Hunt did, on November 27, 2013, within three years of his November 30, 2010 disclosures to the FBI and approximately seven years after the facts material to an FCA claim arising out of the CMC Contract accrued. Pet'rs' J.A. 6a (Doc #1, Complaint filed Nov. 27, 2013), 34a–35a (timeline of allegations material to the CMC Contract scheme), 34a ¶ 53 (procurement period, during which scheme operated to rig the Cochise subcontract, beginning Jan. 6, 2006 and ending Feb. 21, 2006).

C. Proceedings Below.

Mr. Hunt's complaint alleged that Cochise "fraudulently induced the Government to enter into the subcontract . . . by providing illegal gifts to Shaw and his team," and that Petitioners had "a legal obligation to disclose credible evidence of improper conflicts of interest and payment of illegal gratuities to the United States but failed to do so." Pet. App. 6a; *see also* Pet'rs' J.A. 21a–22a ¶ 7. Hunt served the sealed complaint on the Government as the FCA requires, but it eventually declined to intervene. Pet. App. 6a, 33a n.2.

Petitioners moved to dismiss, arguing that the suit was barred by the six-year statute of limitations in § 3731(b)(1), Pet. App. 34a, because Mr. Hunt had filed suit approximately seven years after the alleged fraud in the award of the CMC security subcontract. *See* Pet. App. 34a. Mr. Hunt conceded that his complaint would be time-barred under § 3731(b)(1), Pet. App. 34a, but maintained that the action was still timely under the alternative statute of limitations in § 3731(b)(2), Pet. App. 34a, because it had been filed within three years of November 30, 2010, when Mr. Hunt first informed the Government of his employer's allegedly fraudulent activity. Pet. App. 6a.

The district court concluded that Mr. Hunt could not rely on § 3731(b)(2) to render his complaint timely. Acknowledging that the Eleventh Circuit had not yet taken a position on an extant circuit split, Pet. App. 35a–36a, the district court held the complaint was time-barred under both of the then-prevailing appellate

interpretations of § 3731(b)(2). Pet. App. 39a, 35a–40a (discussing circuit split). Specifically, the district court held that § 3731(b)(2)'s three-year statute of limitations was either unavailable to Mr. Hunt because the Government had declined to intervene in the action, or had expired because it began to run when Mr. Hunt learned of the alleged fraud in 2006. Pet. App. 37a. The district court dismissed the complaint on April 28, 2016, Pet. App. 40a, and Mr. Hunt appealed. Pet'rs' J.A. 15a (Doc. #65, May 24, 2016 Notice of Appeal).

The Eleventh Circuit reversed, Pet. App. 31a, finding the analyses of the other circuits at odds with the unambiguous statutory text. Pet. App. 13a–14a (resolving allegations of statutory ambiguity in the FCA's statutory context), 18a, 21a (recognizing rejection of "the absurdity doctrine is at odds with the published opinions of two other circuits," discussed *infra*) (citations omitted).

It further found that the statute's plain meaning fully aligned with Congress's stated purpose, Pet. App. 26a, encouraging False Claims Act suits after the Government has declined to intervene. Pet. App. 13a–15a, 18a–21a. The Eleventh Circuit expressly held that relators can rely on the limitations period in § 3731(b)(2) even when the Government does not intervene, Pet. App. 22a, departing from two other circuits' approaches. Pet. App. 21a. It further held that the three-year limitations period in § 3731(b)(2) is triggered by the relevant Government official's knowledge of the alleged FCA violation, Pet. App. 30a, not by the relator's own knowledge. Pet. App. 29a–31a. The Eleventh Circuit

explicitly rejected the Ninth Circuit's approach, Pet. App. 30a–31a, which held that a relator becomes the relevant "official of the United States" after the government declines, thus rendering the relator's knowledge dispositive for the statute of limitations inquiry. Pet. App. 30a. The court below found this "legal fiction . . . inconsistent with th[e] text" of that provision. Pet. App. 30a (citing *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996)).

Because Hunt had informed the FBI in November 2010 and filed suit within three years of that date, the Eleventh Circuit concluded that Hunt's suit was timely and should proceed. Pet. App. 31a.

SUMMARY OF THE ARGUMENT

More than 150 years ago, Congress created the False Claims Act ("FCA") to combat fraud against the Government and recoup fraudulently obtained funds. Congress amended the Act in 1986, adding the provision at issue here, 31 U.S.C. § 3731(b)(2), which was designed to increase the FCA's effectiveness at stopping fraud by allowing more time to sue, and more private suits. The FCA's fraud-fighting mechanisms are an ongoing success, netting $2.8 billion for the Government in the past year alone. Seventy-five percent of that sum arose from suits brought by relators on the Government's behalf. These numbers are no accident; they result from a carefully calibrated approach whereby the Government and relators work in tandem. Although

the Government remains the real party in interest at all times, relators are rewarded with a graduated portion of the recovery as a way to incentivize them to come forward and bring lawsuits.

Mr. Hunt learned of a bribery and bid-rigging contract in 2006. In accordance with this statutory scheme, he reported it to the FBI in 2010, and filed suit as a relator in 2013, within three years of informing the FBI.

The Petitioner contractor-defendants assert that Mr. Hunt's suit—filed seven years after the alleged fraud but within three years of his alerting the FBI—is barred by the FCA's statute of limitations in 31 U.S.C. § 3731(b)(2).

Focusing on 31 U.S.C. § 3731(b)'s plain, unambiguous language, the Eleventh Circuit below rejected Petitioners' contention, and held that both alternative limitations periods found in the subsections of § 3731(b) apply equally to the Government and relators. Pet. App. 29a. The court further found this plain reading fully comported with the congressional purposes underlying the FCA. Pet. App. 29a.

The Eleventh Circuit is correct. No ambiguity plagues this provision. Even Petitioners cannot argue that it does. Because the plain text shows that both statute of limitations provisions are available to both the Government and relators, this Court need not wade into the murky realm of interpretation reserved for ambiguous statutes. The statute of limitations section begins by identifying the lawsuits that fall under its umbrella: civil actions in § 3730. 31 U.S.C.

§ 3731(b)(2). The Court has already determined that Government and relator suits are such "civil actions." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 421–22 (2005). The provision then describes the two potential limitations periods and ends with "whichever occurs last." 31 U.S.C. § 3731(b)(2).

This statutory language is plain. Petitioners concede as much, referring to the Eleventh Circuit's construction of the statute as "literal." When that is the case, this Court leaves the statute alone except in three rare and exceptional circumstances, none of which are present here. Petitioners skirt about the fringes of these exceptions but never squarely claim they apply in this case, instead characterizing the statutory problem as being one of "counterintuitive results." To accomplish this, Petitioners rely on Graham County as their makeweight, even though that case concerned an ambiguous statutory provision, and this case does not. In fact, Petitioners' framing of the supposed problem introduces complexity and the counterintuitive results of which they complain.

But even if this Court were to walk down the road of statutory ambiguity, the result would be the same: Relators have equal access to § 3731(b)(2)'s discovery rule. The FCA is designed to stop fraud, and its provisions work together to that end. Taken in context, Congress's linguistic choices are coherent and sensible. But viewed through the lens of Petitioners' construct, however, the provisions fall into disarray, foreclosing the recoupment of vast sums stolen from the Government. Congress differentiated between the Government and relators only when it needed to distinguish between

the rights and obligations attributed to each, and the FCA's plain language reflects that drafting decision.

Petitioners suggest an interpretation that is unsupported by the language, one that turns on the Government's often months-later (and sometimes years-later) decision whether to intervene in a relator-initiated suit. As detailed below, this makes no sense, flies in the face of traditional workings of statutes of limitations, undercuts the FCA's overarching goal, and creates superfluities. For example, the FCA's relation-back provision, 31 U.S.C. § 3731(c), would no longer operate as Congress intended under Petitioners' plan. With respect to default limitations rules, Petitioners replace the traditional trigger of knowledge with the unusual—and unworkable—concept of intervention. Far from vindicating the core limitations purposes of predictability and certainty, Petitioners inject the opposite, resuscitating cases years after filing that might otherwise have been deemed dead, simply by the fortuity of the Government's intervention.

In contrast to Petitioners' tortured approach, the Court should enforce the statute of limitation as written: six years as a general rule, extended to an additional three based on the Government official's discovery of the fraud, and in any event, no later than ten years from the date of the alleged fraud.

The statute's purposes and legislative history merely confirm everything set forth above: Congress designed a fraud-fighting system through a unique Government–relator partnership. The Government possesses the investigative power; the relator holds the inside knowledge. The limitations provisions should

bolster that purpose, not undermine it. By allowing enough time for these twin forces to work together, the 1986 FCA amendments expressly reflect Congress's intent to make that happen.

Finally, Petitioners' and amicis' collection of policy rationales for rewriting the statute fall flat. Animated by a goal Congress did not embrace (rapidity), and fueled by imagined and self-defeating bad faith on the part of relators and the Government, Petitioners warn of a parade-of-horribles stemming from any approach but their own. In reality, Congress instituted deliberate, effective safeguards to prevent the very problems that Petitioners conjure. The first-to-file bar, the public disclosure bar, the original-source rule, and the potential for reduced recoveries for bad-faith relators were all in place before Congress enlarged the statute of limitations. Because this Court need not delve into policy rationales when the statutory language is clear, it should not entertain Petitioners' alternate argument. The language is clear, so the Court need not rewrite it to pretend that private relators are "official[s] of the United States charged with responsibility to act in the circumstances."

ARGUMENT

I. Section 3731(b)(2) applies to relators regardless of the government's subsequent decision to intervene or to decline.

A. The Bedrock Rule that This Court Does Not Interpret Unambiguous Statutory Language Begins and Ends the Inquiry into § 3731(b).

If the statutory language is plain—as it is here—then this Court need not interpret it. *See Culbertson v. Berryhill*, ___ S. Ct. ___, 2019 WL 122163, *4 (Jan. 8, 2019) (stating the Court "begi[ns] with the language of the statute itself, and that is also where the inquiry should end" when the "statute's language is plain") (internal citation and quotations omitted); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) ("The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (internal citation and quotations omitted); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("Where the language is plain . . . the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.").

In fact, there is no need to "interpret" § 3731(b), as the Court's sole obligation is to apply the statute's literal terms. *Caminetti*, 242 U.S. at 485 ("[I]f the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms."); *Treat v. White*, 181 U.S. 264, 269 (1901) (noting that if Congress has

acted within its authority when enacting a law, "[i]t does not come within the province of this [C]ourt to consider why [Congress chose as it did]").

Section 3731(b) unmistakably sets forth two limitations periods that apply to "civil action[s] under section 3730." 31 U.S.C. § 3731(b). Both Government-initiated suits under § 3730(a), and relator-initiated suits under § 3730(b), qualify as "civil actions", as the Court stated in *Graham*. *See Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 416 (2005) ("[S]ection 3731(b)(1) . . . naturally applies to well-pleaded §§ 3730(a) and (b) actions."). These limitations periods are offered in the alternative—the suit initiator gets the benefit of "whichever occurs last." Thus, § 3731(b)(2) does not have to "expressly mention relators," Pet'rs' Br. 18; having given relators the power to initiate a civil action, the statute's clear language gives relators both options.

Petitioners never quite assert that this case presents a statutory ambiguity. Their brief mentions ambiguity but once, and not with reference to the question presented here. Pet'rs' Br. 16. Hence, Petitioners' heavy reliance on *Graham* is puzzling—it is a statutory ambiguity case. Petitioners essentially concede this case is not. *See* Pet'rs' Br. 11, 15, 23, 35 (stating that the literal (or even "hyperliteral") language would permit relators to resort to the statute of limitations provision in § 3731(b)(2)). Thus, the Court's finding of ambiguity in *Graham* with respect to the interplay between § 3731(b) and § 3730(h), *Graham*, 545 U.S. at 415, does little work for Petitioners in this case.

This clear meaning rule already sanctioned in *Graham* should be upended only under three "rare and exceptional" circumstances—circumstances not present here. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). Proceeding beyond a statute's unambiguous language is permissible only when it would: (1) render a statute unconstitutional, *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 64 (1953); (2) create absurd results, *Crooks*, 282 U.S. at 59; or, relatedly, (3) be "impossible" to square with congressional intent, *see Pub. Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The unconstitutionality exception is not implicated in this case, and Petitioners have failed to surpass the high bar required to invoke the remaining two exceptions.

1. The Absurd Results Exception Does Not Apply.

A court may refuse to enforce unambiguous language in a statute only if the result produces an absurdity "so gross as to shock the general moral or common sense," which arises only "rare[ly]." *Crooks*, 282 U.S. at 60. Interpretive absurdity requires much more than an anomalous result; it must be one so bizarre as to confirm that Congress simply could not have intended it. *See, e.g., Pub. Citizen*, 491 U.S. at 471–72 (Kennedy, J., concurring), citing absurdity examples from *Holy Trinity Church v. United States*, 143 U.S. 457, 461 (1892) (The crime of drawing blood on the streets cannot include a surgeon who rescues a bystander; a

prisoner who flees a burning prison cannot be prosecuted for escape; and the crime of obstructing the mails does not apply when a murderous postman is arrested.). A statutory result that "may seem odd . . . is not absurd." *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 565 (2005). Parties cannot simply manufacture absurdities from thin air or cobble congressional intent together from disparate sources, as one must do with an ambiguous statute; there must be some indication that "make[s] *plain* [Congress's intent] that the letter of the statute is not to prevail." *Crooks*, 282 U.S. at 60 (citing *Treat v. White*, 181 U.S. 264, 268 (1901)) (emphasis added).

As a threshold matter, Petitioners do not seriously pursue the absurdity exception. Although halfheartedly invoked at the certiorari stage, they have all but abandoned it in their merits brief. *Compare* Cert. Pet. at 10 (asserting that "*Graham* directs courts to construe the sometimes 'imprecise[]' provisions of the False Claims Act within the broader context of the statute as a whole and in a way that will avoid absurd results"), *and* Cert. Pet. at 15, 20, 22 (also discussing absurdity doctrine), *with Graham*, 545 U.S. 409 (failing to reference the absurdity doctrine at all), *and* Pet'rs' Br. at 29 (mentioning absurdity only once in argument section). Instead, Petitioners have now latched onto "counterintuitive results," a passing remark from *Graham*. *Graham*, 545 U.S. at 421 (when resolving statutory ambiguity "[Section] 3731(b)(1)'s text permits a construction that avoids these counterintuitive results"). Petitioners have then grafted it onto this

Court's unambiguous-statute jurisprudence. *See* Pet'rs' Br. at 3, 9, 11, 14, 15, 17, 26, 35, 39, 45 (proposing "counterintuitive" results as a reason for this Court to construe the statutory language as excluding relators from the ambit of § 3731(b)(2)).

"Counterintuitive" results, however, do not pass the Court's absurdity muster. The Court has repeatedly instructed that even when the results are distasteful or burdensome, clear statutory language must be applied as written. *Chung Fook v. White*, 264 U.S. 443, 445-46 (1924); *Barnhart*, 534 U.S. at 459-62 (observing that invoking "counterintuitive results" is an appeal to the absurdity doctrine). Even if Petitioners had engaged in a full-throated pursuit of the absurdity exception, they could not have satisfied it. The textual, contextual, policy and legislative clues Petitioners invoke might be persuasive when this Court is deciding how to interpret an ambiguous provision, but those hints, even taken together, do not constitute the type of "clear" congressional indicia that override Congress's chosen, plain language. *See Treat*, 181 U.S. at 268. In any event, as discussed below—*see infra* Section I.B.—the FCA's overriding purpose, statutory context, and legislative history, read against statute of limitations "default rules," *Graham*, 545 U.S. at 418, favors a result that permits relators full access to § 3731(b)(2). The absurd results exception is not satisfied here.

2. Permitting Relators to Invoke § 3731(b)(2) According to Its Plain Terms Is Not "Impossible" to Square with Congressional Intent.

Another circumstance permitting courts to look beyond unambiguous statutory language is when the literal application of that text would produce a result "demonstrably at odds" with Congress's intent. *Ron Pair Enters., Inc.*, 489 U.S. at 242. Here again, the bar is high. For a party to overcome the plain, unambiguous language, it must show that it would be "quite impossible that Congress could have intended the result." *Pub. Citizen*, 491 U.S. at 471 (Kennedy, J., concurring). This exception is sometimes subsumed within the absurdity exception. *See Pub. Citizen*, 491 U.S. at 470–71 ("This exception remains a legitimate tool of the Judiciary, however, only as long as the Court acts with self-discipline by limiting the exception to situations where the result of applying the plain language would be . . . absurd, where . . . Congress could [not] have intended the result.") (Kennedy, J., concurring). Regardless of whether it serves as a subset of absurdity or an independent basis on which to depart from unambiguous statutory language, the strictures are the same: the contrary intent must have been "clearly expressed" by the legislative body. *See Russello v. United States*, 464 U.S. 16, 20 (1983) (internal quotation marks omitted). Thus, if the legislative history and surrounding provisions are anything but clear—if they are inconclusive—then the Court should not override the unambiguous language.

Here, at worst, the legislative history and surrounding provisions are inconclusive. In context, they affirmatively support Respondent's, and the Eleventh Circuit's, conclusion: relators may invoke § 3731(b)(2). *See infra* Sections I.B.1., I.B.3. Either way, Petitioners cannot meet their burden of showing the "impossibility" required to overturn the unambiguous language. Congressional arbitrariness is not enough. *FBI v. Abramson*, 456 U.S. 615, 640–41 (1982) (O'Connor, J., dissenting) ("We do not, and should not, make it our business to second-guess the Legislature's judgment when it comes to [matters of congressional line-drawing]. Line-drawing, after all, frequently requires arbitrary decisions that cannot sensibly be subjected to judicial review."). Even mistake and inadvertence do not warrant this Court's intervention into otherwise unambiguous statutory language. *See Unexcelled Chem.*, 345 U.S. at 64 ("[W]hen Congress, though perhaps mistakenly or inadvertently, has used language which plainly brings a subject matter into a statute, its word is final. . . ."). Thus, even against a backdrop of inartful drafting or inconclusive legislative history, the unambiguous language triumphs. Petitioners provide no basis for this Court's rewriting of this unambiguous statutory language.

B. Even if § 3731(b)(2) Were Ambiguous, that Ambiguity Is Resolved in the Relator's Favor by the FCA's Statutory Structure, Statute of Limitations Defaults, and the FCA's Purpose.

If § 3731(b)(2) is ambiguous, all interpretive tools for resolving that ambiguity point in one direction: giving FCA relators (b)(2)'s discovery rule. *Graham*'s own ambiguity-resolving tools—statutory context and default statute of limitations rules—each independently confirm that (b)(2) applies to non-intervened actions. *See Graham*, 545 U.S. at 417–18 (resolving FCA retaliation ambiguity by drawing on the FCA's statutory structure and default rules for statutes of limitations). Beyond these tools, the FCA's statutory purpose and its legislative history also lead to the same result: § 3731(b)(2) applies to relator-brought suits regardless of Government intervention.

1. Reading § 3731(b)(2) to Cover All *Qui Tam* Actions Advances the FCA's Coherent Structure and Procedural Plan.

The FCA has a deliberate structure that furthers a unique procedural plan. The statute creates complementary but distinct procedural roles for the relator and the Government during litigation, while granting potential party status to both. To be coherent, the FCA's structure and this plan command a reading that puts relators on the same statute of limitations footing as the Government. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("A fair reading of legislation demands a

fair understanding of the legislative plan."). That is so for three reasons. First, the FCA uses particular language when differentiating between the Government and relators, but then abandons that language when it does not. Section (b)(2) is squarely the latter type of section; it has no language differentiating relators from the Government and thus applies to both. Second, even if the statutory scheme permitted reading (b)(2) to distinguish between relators and the Government, it certainly does not support Petitioners' further cut between intervened and non-intervened actions. Third, Petitioners' argument that (b)(1) is superfluous if (b)(2) applies to non-intervened actions is not only belied by the plain language of (b)(2) itself, but legally untenable. Indeed, it is Petitioners' reading that makes a § 3731 provision superfluous—subsection (c)'s relation-back provision.

a. Consistent with the FCA's Procedural Scheme, § 3731(b) Equates the Government and Relators.

The FCA's linguistic framework reflects a two-pronged procedural plan. One prong deals with the Government and relator's distinct but complementary roles in the litigation process. The FCA uses "government" and "person" when it needs to distinguish one from the other. *See* 31 U.S.C. § 3730(b)–(d) (using "government" and "person" to describe each actor's procedural rights and limitations in intervened and non-intervened actions). For example, the Government and the relator operate independently in deciding to bring

or join a suit, 31 U.S.C. § 3730(a), (b)(2), (b)(4), (c)(1), (c)(3); the Government has sole investigatory power during the seal period, *id.* § (b)(2)–(3), and if it does not intervene, the Government has the right to be served copies of discovery, may ask to suspend discovery or limit the relator's participation, and retains a dismissal veto, *id.* § (b)(1), (c)(2)(C), (c)(3), (c)(4). In turn, the relator has independent rights even in Government-intervened actions. *Id.* § (c)(1), (2)(A). In these sections, "government" means only the Government and "person" means the relator.

At other times, however, when Congress did not need to confer different rights and obligations on the Government and a relator, the FCA dispenses with the dichotomy. For example, § 3731(d) refers to the "United States" as bearing the FCA's preponderance burden of proof. 31 U.S.C. § 3731(d). In choosing to name the "United States" here, Congress was not distinguishing between relators and the Government. Indeed, under default burden of proof rules, the relator bears this same burden in non-intervened suits. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99–100 (2003) (reasoning that statutory silence on the burden of proof defaults to the "conventional rule" that "requires a plaintiff to prove his case by a preponderance of the evidence") (internal quotation marks omitted); *see also United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 707 (7th Cir. 2014) (applying the preponderance burden to relators); *Hagood v. Sonoma Cty. Water Agency*, 81 F.3d 1465, 1472 (9th Cir. 1996) (same); Claire M. Sylvia, *The False Claims Act: Fraud*

Against the Government § 10:107 (2018) ("Nor would application of different standards comport with the purposes of the Act, which are to permit the relator to stand in the shoes of the Government.").

Congress's choice of "United States" in subsection (d) does not mean that it intended to excise non-intervened cases from (b)(2), as Petitioners suggest. Pet'rs' Br. 19–20 (relying on *Graham*). First, *Graham* said nothing about *qui tam* actions or the applicability of § 3730(b)(2) to such cases. It dealt with § 3730(b)(1)'s inapplicability to private *retaliation* cases—cases that have nothing to do with the Government or relators acting in a *qui tam* status. Second, had Congress intended to carve out declined suits, it could have simply done so by adding "by a person or the government" in (b)(1) and "by the government" in (b)(2). It did not.

Section 3731(b), as actually written, fits this statutory scheme only if both its limitations periods apply to both actors. Unlike § 3730, whose "government" and "person" refer to autonomous actors, § 3731(b) makes no such distinction. Instead, its prefatory language refers cohesively to "a civil action under 3730" and just as cohesively pulls (b)(1)'s six-year rule and (b)(2)'s discovery rule options together in the final clause, "whichever occurs last."

b. Nothing in § 3731(b) Supports Distinguishing Between Intervened and Non-Intervened Actions.

Even more strained than a Government-brought and relator-brought suit distinction is Petitioners' further delineation: applying (b)(2) to relator-brought actions only if the Government later decides to intervene. Given that the FCA plainly differentiates between Government-as-actor and relator-as-actor when it needs to, there is no support for reading subsection (b)(2)'s actor-neutral language to make two cuts—one that excludes declined actions but includes intervened actions.

Arguing that applying § 3731(b)(2) to declined actions would render § 3731(b)(1) superfluous, Petitioners ignore the word "after" in (b)(2): "(b) A civil action under 3730 may not be brought . . . (2) more than 3 years *after* the date when facts material to the right of action are known or reasonably should have been known. . . ." (emphasis added). Giving effect to the word "after," no relator who learned about the fraud and waited ten years to file without telling the Government could use (b)(2). Pet'rs' Br. 26–28. Subsection (b)(1) applies precisely where it is needed most—to spur relators to approach the Government with information about fraud sooner rather than later.[2]

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[2] It is true that (b)(1) will bar some diligent relators, such as the accountant who uncovers his employer's fraud after six years and then rushes to the courthouse without involving the

Section (b)(2)'s temporal specificity fits the objective of discovery-based statutes of limitations: to catch wrongdoers who hide their illegal acts, preventing their discovery until well into or after the limitations period. *See Gabelli v. SEC*, 568 U.S. 442, 450–51 (2013). Under a discovery-based limitation period, the victim learns of the wrong—or has enough information available to it that it should have known—and then files suit within a defined period of time.[2] *Id.* The same progression applies in FCA (b)(2) cases: the fraud victim—here, the Government—learns of the fraud, and then either the Government or the relator is empowered to file suit within three years, but in no event more than ten years after the fraud was committed. In no situation should (b)(2) apply when suit precedes knowledge.

Nor, as a basic legal matter, can the stricture against "superfluous" statutory language be invoked simply because there is some temporal overlap between (b)(1) and (b)(2). "Redundancies across statutes are not unusual events in drafting, and so long as there is no positive repugnancy between two laws, a court must give effect to both." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (internal citation and quotation omitted) (where neither statutory provision renders the other "wholly superfluous" the canon against superfluous legislation does not apply). So long as there is a meaningful difference between overlapping

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government. But no statutory scheme achieves perfect results, and this scheme fundamentally motivates reporting.

[2] Petitioners' authorities confirm that this is how discovery-based limitation rules work. Pet'rs' Br. 24 n.4.

statutory provisions, there is no reason to judicially reconstrue them. *Husky Int'l Elecs. v. Ritz*, 136 S. Ct. 1581, 1588 (2016). Petitioners do not remotely claim that (b)(1) and (b)(2) are positively repugnant to each other, or that there is no meaningful difference between them. Mere overlap does not render statutory provisions suspect, and Petitioners' superfluous argument thereby founders.

c. Petitioners' Strained Reading of Subsection (b)(2) Reads the Relation-Back Provision out of the FCA.

Conversely, Petitioners' own interpretation would make superfluous the relation back provision in § 3731(c). That section, added in the 2009 amendments to the FCA, *see* Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, 123 Stat. 1617, provides that when the Government elects to intervene, "[f]or statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action." That section was added to overturn decisions barring relation back in cases where the seal period was extended and the defendant did not have prior notice of the relator's complaint. *Id.* (overruling, *e.g.*, *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263 (2d Cir. 2006)). With subsection (c) now in place, the Government's intervention is timely as long as the relator's action is timely. For example, if the Government learns of the fraud in year five, the relator sues in year seven, and the Government intervenes in

year nine, (b)(2) will apply to the relator's suit and (c)'s relation back provision will make Government intervention timely.

Petitioners' reading disrupts this scheme. If Petitioners' reading holds, the Government's intervention would not relate back to the relator's suit. It would instead trigger an entirely different statute of limitations at the moment of intervention, extending the period from six to ten years. *See* Br. for Amicus Curiae Professor Joel D. Hesch ("Hesch Br."), at 10–11. In effect, the relator's suit would "relate forward" to the Government's filing rather than the Government's filing relating back.

In sum, Congress knew when it needed to make clear distinctions between the Government and relator and when it did not, and wrote the FCA accordingly. The only interpretation that fits this scheme and Congress's procedural plan is one that applies (b)(2) to relator suits whether the Government intervenes or not.

2. Against the Backdrop of Default Statute of Limitations Rules, (b)(2) Must Be Read to Encompass Non-Intervened Actions.

Independent of statutory context, *Graham*'s second interpretive tool—reading statutory text in accord with default limitations rules—confirms that (b)(2) applies to non-intervened cases. In *Graham*, the Court refused to make the employee's FCA retaliation claim accrue before it even started: that is, before the

employer even punished the employee for engaging in FCA activity. 545 U.S. at 418–21. To hold otherwise would have upset the default rule that limitations periods begin when the cause of action accrues, for the clock would have started with the defendant's fraud rather than the defendant's retaliatory act. *Id.* at 421.

The opposite is true here. Applying (b)(2) in non-intervened cases promotes default limitations rules in two ways. First, pegging (b)(2)'s limitations period to Government knowledge in all cases honors the core value that statutes of limitations be certain at the time of filing. This same reading respects the default discovery-based limitation rule that victim knowledge triggers accrual, which is the guiding principle when the victim is the real party in interest, no matter who brings suit. In contrast, rather than making pre-suit *knowledge* the accrual flashpoint, Petitioners' reading would trigger accrual based on post-suit *intervention*—in effect producing a springing statute of limitations that expands or contracts based on the Government's unpredictable and non-transparent intervention decision.

To square with default limitations rules, (b)(2) must be read to promote predictability and certainty. *See Lozano v. Montoya Alvarez*, 572 U.S. 1, 14 (2014) (articulating the "basic policies furthered by all limitations provisions" as "certainty and repose") (internal alterations and citations omitted); *Greyhound Corp. v. Mt. Hood States, Inc.*, 437 U.S. 322, 335 (1978) (rejecting a statute of limitations reading that would produce "confusion and uncertainty" against the "congressional

emphasis on certainty and predictability"). Knowing the limitations period right from the start relieves the parties of crippling uncertainties: for plaintiffs, being unsure of when to file or what will happen if they do; for defendants, being unable to move on with their affairs and freezing their resources at the prospect of damages. *Cf.* William Grayson Lambert, *Focusing on Fulfilling the Goals: Rethinking How Choice of Law Regimes Approach Statutes of Limitations*, 65 SYRACUSE L. REV. 491, 531 (2015) ("Without a clear rule," the parties are "left to a lawyer's best guess as to which statute of limitations applies.").

If (b)(2) applies to both intervened and non-intervened relator actions, uncertainty will be laid to rest. There will be one timeline for filing suit, and it will not budge. This timeline will start with the Government learning the "facts material to the right of action," and it will end three years later—and in no event more than ten years after the fraud. Because this reading of (b)(2) applies only when the Government's knowledge *precedes* the relator's filing, as explained *supra* I.B.1, by the time the relator files suit the statute of limitations will be firm and clear to all. Although the parties may end up litigating whether or when the Government "knew or should have known" the material fraud facts, that litigation reality applies equally to intervened suits. Petitioners overstate the hassle of litigating this issue. *See* Pet'rs' Br. 32. The Government is entitled to receive FCA discovery even in declined cases, 31 U.S.C. § 3730(c)(3), and can hardly complain if called upon to produce its own documents and

witnesses. In any event, participating in a discrete, threshold discovery issue will be a small price to pay for the certainty that comes with giving relators and the Government a uniform and predictable statute of limitations.

Meanwhile, Petitioners' (b)(2) reading throws certainty out the window. If (b)(2) applies to relator-brought cases only when the Government later intervenes, no one will know if the case is timely until the intervention deadline, which is at least sixty days *after* the relator files.

During this "limbo" period, the relator will not know whether his claim is stale or live. "It would hardly be desirable to place the question of tolling *vel non* in this jurisprudential limbo, leaving it to be determined by those later events, and then pronouncing it retroactively." *Wallace v. Kato*, 549 U.S. 384, 395 (2007) (rejecting interpretation of a tolling period whose application would depend on a later-filed suit). Even though the defendant is not entitled to notice of the action during the seal period, defendants often learn about the relator's suit through informal avenues, *see infra* I.C., which means the defendant will suffer the same paralysis. From the Government's perspective, intervention decision-making will be distorted. To save otherwise time-barred cases, the Government may be pressured to intervene when sound resource and enforcement judgment counsel otherwise. Considerations such as agency priorities, personnel availability, and allocation of resources will bow to the exigency of keeping the case alive. *See United States ex rel. Ubl v. IIF*

Data Sols., 650 F.3d 445, 457 (4th Cir. 2011) (internal citation omitted) ("Given its limited time and resources, the Government cannot intervene in every FCA action, nor can the government pursue every meritorious FCA claim.").

Even more troubling, if the Government *does* intervene, the case will magically transform from barred to live based on a party's post-filing action—a phenomenon completely foreign to statute of limitations doctrine and inconsistent with discovery-based limitations rules. Whether or not the Government intervenes, nothing that matters to statutes of limitations has changed. If the Government learned about the fraud five years after it happened and the relator filed suit in year seven, for instance, a post-filing intervention does not change the time span between the accruing event (occurrence or knowledge of fraud) and suit, which is how discovery-based statutes of limitations are measured.

Worse yet for the certainty principle, under Petitioners' reading, the case could be well along before the statute of limitations firms up. Because the FCA permits Government intervention at any time for good cause, 31 U.S.C. § 3730(c)(3), the specter of a springing statute of limitations continues to loom. Following an initial declination, the relator and defendant could be midway through a statute of limitations dismissal motion only to have the Government's intervention moot it by expanding the limitations period. This is anathema not only to how statutes of limitations work, but also to how intervention works. Intervenors may toll

actions, *Greyhound Corp.*, 437 U.S. at 330–36, and intervenors may relate back to the original complaint, *see* 31 U.S.C. § 3731(c), but in no case do intervenors trigger an entirely different statute of limitations, *see* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1920 (3d ed. 2019) ("The intervenor is treated as if the intervenor were an original party. . . . [he] must join subject to the proceedings that have occurred prior to his intervention; he cannot unring the bell.").

Petitioners make much of the unexceptional notion that tolling typically turns on the knowledge and acts of the plaintiff, not a non-party. Pet'rs' Br. 23–26. Specifically, they reason that (b)(2) is not available to relators in non-intervened suits because that subsection turns "on the knowledge of a government official," yet tolling turns on only the "plaintiff's" knowledge, and the Government is not the plaintiff in non-intervened suits. Pet'rs' Br. 23–26. This argument ignores the relator's and Government's related but distinct rights. In non-intervened suits, the FCA splits what would otherwise be one plaintiff into two actors: a "party" (the relator) and a "real party in interest" (the Government).[4] In such suits, the Government remains

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[4] Given the near-unique status of *qui tam* actions, *Vt. Agency*, 529 U.S. at 768 n.1, it is unsurprising that the Eleventh Circuit would not cite a case "outside the False Claims Act setting in which a court tied the running of a statute of limitations to the knowledge of a real party in interest who was not also an actual party to the case." Pet'rs' Br. 26. The pertinent question is why Petitioners rely on non-*qui tam* case arguments to explain how a *qui tam* suit should function.

the real party in interest, that is, the "actor with a substantive right whose interests may be represented in litigation by another." *Eisenstein*, 556 U.S. at 934–35. In FCA cases, the Government's substantive right is as fraud victim; the relator has no such injury. *Vt. Agency*, 529 U.S. at 772–73. The relator's stake is different; it manifests as an "assignee assert[ing] the injury in fact suffered by the [government] assignor." *Id.* at 773.

With this in mind, Petitioners' Government-must-be-the-plaintiff argument fails. In the mine run of tolling cases, courts use "plaintiff" as shorthand for victim—the one who has suffered injury. In reality, accrual and tolling principles apply to the civil victim with substantive rights no matter who appears in the suit to enforce them. *See* Evan Caminker, *supra*, at 354 n.71 ("[A]ny given false claims practice ought to be understood as creating but a *single* . . . injury under the Act. [T]he 'true' plaintiff . . . must be the United States, *no matter who brings an action on its behalf.*") (emphasis added) (internal quotations and citations omitted). Because that victim in FCA cases is the Government, it is the Government's knowledge that matters for tolling principles and (b)(2).

3. The Relator's Critical Role in Recouping Government Funds from Fraudsters Requires Equal Access to the Act's Limitations Periods.

Graham's two interpretive tools settle the question of (b)(2)'s application to non-intervened cases. And

the tools left in the box—statutory purpose and legislative history—dictate the same result. Congress set up three co-equal paradigms for FCA enforcement, and it did not single out declined actions for less favorable statute of limitations treatment. Indeed, the relator's and Government's hand-in-glove partnership to recoup pilfered funds cannot work otherwise. Any way the relator's is role is considered—functionally as partner combatting fraud or legally as assignee—it would contravene the FCA's fraud-fighting purpose to shorten the lives of their claims just because the Government declines the action. The legislative history of the FCA's 1986 amendments shows a firm congressional commitment to bolstering the FCA's private right of action and to fortifying the means to expose hidden fraud. These FCA purposes are fundamentally at odds with depriving relators—that critical "posse of ad hoc deputies [which] uncover and prosecute frauds against the government," *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. (1992)—of (b)(2)'s discovery rule.

a. Relators and the Government Are Synergistic Partners in the Fight Against Fraud.

Congress built into the FCA a unique public-private partnership: the FCA is the Government's premier anti-fraud weapon, and the relator its main crusader. *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 440 (2011) ("'Encouraging more private enforcement suits serves to strengthen

the Government's hand in fighting false claims.'") (internal quotations omitted); Pamela Bucy Pierson & Benjamin Patterson Bucy, *Trade Fraud: The Wild, New Frontier of White Collar Crime*, 19 OR. REV. INT'L L. 1, 33 (2018) ("The FCA's effectiveness is due, in large part, to the public-private partnership it creates between individuals, known as *qui tam* relators, and the U.S. Department of Justice."). Congress decided that recruiting individuals with inside information and appealing to their self-interest was the best way to stop fraud and to get the public treasury its money back. The Act's statute of limitations in section (b)(2) must be construed in light of this purpose. If (b)(2)'s addition enhances the Government's ability to do these things, including relators in the enforcement regime does so even more.

The FCA–relator partnership is enriched by the relator's insider status. Complex, well-hidden fraudulent schemes—common in defense contracting cases—will see the light of day only if someone close to the transaction exposes it. Pierson & Bucy, *supra*, at 42 ("Because few individuals are foolish enough, careless enough, or bold enough to submit false claims without creating complex cover-ups, there is always concealment. . . . fraud cannot be effectively detected or deterred without the help of those who are intimately familiar with it."). Relator-insiders have industry expertise and know the business's customs and habits; they know the players and their motivations and agendas; and most important, they know where to find the evidence. *Id.* at 42–43. Relators are, in short, powerful,

efficient partners. *Id.* at 42. This partnership works. Between 1986 and 2018, FCA cases brought back more than $59 billion to the treasury—with 72 percent coming from relator-brought actions. Department of Justice, "Fraud Statistics—Overview, Oct. 1, 1987—Sept. 30, 2018, U.S. DEP'T OF JUSTICE," available at https://www.justice.gov/civil/page/file/1080696/download. In fiscal year 2018 alone, the Government recovered over $2.8 billion in FCA settlements and judgments—with seventy-five percent coming from relator-brought actions. *See* U.S. Dep't of Justice, *Justice Department Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018*, DEP'T OF JUST. OFF. OF PUB AFF. (Dec. 21, 2018), available at https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018.

Nothing in the Act or its purposes even hints that Congress wanted to throw away non-intervened cases. Indeed, over the FCA's 150-year history, Congress has resisted judicial efforts to narrow the Act. Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into A Modern Weapon*, 65 TENN. L. REV. 455, 460 (1998); James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1278 (2013).

Adopting rigid interpretations that inhibit relator actions would "prejudice the Government by depriving it of needed assistance from private parties." *State Farm*, 137 S. Ct. at 443. Although the FCA sets some procedural restrictions for relators, all of these are

consistent with Congress's goal to encourage private actions by relators who have something truly valuable to give the Government. *See infra* Part I.C.

b. As Partial Assignees of the Government's FCA Damages Claim, Relators "Stand in the Government's Shoes" for Suit-Bringing Purposes, Including the Applicable Statute of Limitations.

The relator's role as "partial assignee" of the Government's damages claim confirms that for statute of limitations purposes, relator-initiated claims in declined cases survive equally as long as Government-managed cases. *Vt. Agency*, 529 U.S. at 773. When a suit begins, the relator "stands in the Government's shoes—in neither a better nor worse position than the Government stands when it brings suit." *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006); *see* 31 U.S.C. § 3730(b) ("A person may bring a civil action for a violation of section 3729 *for the person and for the United States Government*.") (emphasis added). Putting the relator in those procedural shoes, the FCA "gives the relator himself an interest in the lawsuit, and not merely the right to retain a fee out of the recovery." *Vt. Agency*, 529 U.S. at 772. This interest continues whether or not the Government intervenes. If the Government does join, the relator has the right to stay on as a party, to a hearing before voluntary dismissal, and to object to settlement. *Vt. Agency*, 529 U.S. at 772 (citing 31 U.S.C. § 3730(c)(1), (c)(2)(A), (c)(2)(B)).

Most significant, the relator retains a right to recover in intervened actions, a fee that remains substantial at fifteen to twenty-five percent. 31 U.S.C. § 3730(d)(1).

This Congressional vision fails if (b)(2)'s discovery rule arbitrarily carves out non-intervened cases. The interest Congress gave relators in their FCA lawsuits would be impaired if that interest were extinguishable *post-hoc* by the fact of Government declination. Moreover, if a relator cannot use (b)(2) to sue in cases where the fraud was best-concealed—or if there is rampant uncertainty about whether he can—then the FCA cannot reach the worst kind of activity it was designed to stop.

c. Because the FCA's 1986 Amendments Promoted Relator-Driven Suits, the Discovery-Based Limitations Rule Added by Those Amendments Must Be Read Accordingly.

After a period of relative disuse, Congress amended the FCA in 1986 to revive the Act in the wake of federal program expansion and, consequently, more government spending and opportunities for fraud. *See United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1497–98 (11th Cir. 1991); S. Rep. No. 99-345, at 2–3 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5266–68. That same year, the DOJ estimated that fraud had claimed between one and ten percent of the entire federal budget. S. Rep. No. 99-345, at 3 (1986),

as reprinted in 1986 U.S.C.C.A.N. 5266, 5268. Indeed, "45 of the 100 largest defense contractors, including nine of the top 10, were under investigation for multiple fraud offenses." *Id.* at 32. "At the time, 'perhaps the most serious problem plaguing effective enforcement' of the FCA was 'a lack of resources on the part of Federal enforcement agencies.'" *State Farm*, 137 S. Ct. at 443 (quoting S. Rep. No. 99-345, at 7 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5272).

Congress rejoined with a set of reforms, many aimed at giving the Government the whistleblower help it needed. *State Farm*, 137 S. Ct. at 443 (citing S. Rep. No. 99-345, at 23–24 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5288–89). "The basic purpose of the 1986 amendments was to make the FCA a 'more useful tool against fraud in modern times.'" *Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003) (internal citation omitted). Relator-targeted reforms included giving relators the right to continue as parties in intervened actions, 31 U.S.C. § 3730(c)(2)(B), adding an anti-retaliation provision to protect relators, 31 U.S.C. § 3730(h), and increasing relator rewards from ten up to twenty-five percent in intervened cases and from twenty-five up to thirty percent in declined cases. *Compare* 31 U.S.C. § 3730(c)(1)–(2) (1982), *with* 31 U.S.C. § 3730(d)(1), (d)(2) (1994).

Most significantly, Congress added (b)(2)'s discovery-based limitations rule to help the Government catch more fraud, giving suit-bringers the option of the most

favorable time period—whichever occurs last.[5] The express goal of this section was to "'ensure the Government's rights are not lost through a wrongdoer's successful deception,' because 'fraud is, by nature, deceptive.'" *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1035 (9th Cir. 1998) (citing S. Rep. No. 99-345, at 15 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5280). Petitioners provide no reason that Congress would have wanted to bar relators from exposing well-hidden frauds, while allowing the Government to sue for the same fraud.[6] Although relators are often better-positioned to discover fraud than the Government, it does not mean that Congress intended a

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[5] It does not aid Petitioners that (b)(2) was imported from 28 U.S.C. § 2416(c), which sets a general statute of limitations for government-brought civil actions. As explained in Part II *infra*, (b)(2)'s "official of the United States charged with responsibility to act in the circumstances" refers to the knowledge of a subset of Government actors; it does not delimit who may sue under this limitations period. Moreover, Congress enacted §§ 2415–2416 to ***align*** government and private citizens' ability to sue for fraud. 89th Congress, Establishing a Statute of Limitations for Certain Actions Brought by the Government, Committee on the Judiciary, S. Rep. No. 1328, June 24, 1986, at 6–7. The same language in the FCA cannot be used to ***elevate*** the Government's rights ***over*** private litigants when those very litigants fulfill a primary enforcement role.

[6] Moreover, in this same package of amendments, Congress added the provision allowing the government to initially decline and then later intervene in relator suits for "good cause." 31 U.S.C. § 3730(c)(3) (1994). It defies logic that Congress would permit late intervention if that act could abruptly alter the statute of limitations.

wholesale ban on relators' ability to use (b)(2)'s discovery rule in declined cases.

Notwithstanding Petitioners' efforts, "it is impossible to infer from a few isolated and ambiguous phrases a congressional purpose." *Solem v. Bartlett*, 465 U.S. 463, 478 (1984). Petitioners' meager recitation of legislative history arguments, none of which actually address (b)(2)'s applicability to *relators*, does no better than that. Unremarkably, DOJ's statements to Congress in support of amendments suggested by the Attorney General reflect DOJ's own contemporaneous interests, which interests are of a piece with relator-driven suits vindicating precisely the same Government objectives. Pet'rs' Br. 36–37. Pretending as though Senate and House Reports were statutory language, Petitioners also insist that those reports' references to the Government's ability to use (b)(2) mean that this section provisionally excludes relators unless the Government intervenes. Pet'rs' Br. 37–38. But the fact that the Government testified about its own interests says nothing about what Congress thought about a relator's status within (b)(2).

Petitioners' sole support for Congress's "careful[] distinction between the government and relators throughout the legislative history" is a House Report that underscores *expanded* relator rights to remain a party to intervened suits, and the Government's ability to halt relator discovery that interferes with the Government's. *See* Pet'rs' Br. 38. This Report says what the statute already makes manifest: relators and the Government are autonomous actors and decision-makers,

but their fraud claims have the same longevity. These scraps of legislative history cannot be used to manufacture congressional intent. "Nothing in the legislative history" of the FCA "confirms that this particular point"—(b)(2)'s applicability to relators—"bore on the congressional deliberations or was given specific consideration." *Lamie v. United States Tr.*, 540 U.S. 526, 542 (2004).

To the extent the legislative history of the 1986 FCA Amendments informs at all, it demonstrates the overriding objective of doing everything possible to roll back rampant procurement fraud. Petitioners' reading of (b)(2) sidesteps the critical prosecution role that FCA relators have played throughout its history. Moreover, their contrived legislative history contravenes the legislation that was actually enacted. After purposefully empowering relators in 1986, Congress would not have given to relators with one hand and taken away with the other.

C. Petitioners' Policy Arguments Ignore the Realities of FCA Litigation and Undercut the Language and Purpose of the Act.

Halting ongoing fraud, deterring future fraud, and recouping monies are what drives the FCA, as even Petitioners acknowledge. *See* Pet'rs' Br. 3 (citing *Escobar*, 136 S. Ct. 1989, 1996 (2016)); *see* 31 U.S.C. § 3729(a) (outlining civil penalties and treble-damages scheme). Section 3731(b)(2) furthers these goals by allowing

parties additional time to develop and pursue claims. Perhaps recognizing this, Petitioners and their amici inject two additional considerations that pave the way for a series of policy arguments otherwise unavailable to them.

First, Petitioners assert that Congress's animating interest was to ensure the prompt filing of claims when it enacted a provision enlarging the time for filing them. Pet'rs' Br. 28–29. Petitioners' sole authority for this proposition is the Tenth Circuit decision in *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006). Pet'rs' Br. 28–29. The Tenth Circuit's sole authority, in turn, for its promptness rationale was a snippet from a Senate report, which, when read in its entirety, stands for an entirely different proposition.[7] *See Sikkenga*, 472 F.3d at 725 (concluding from Senate report that "Congress

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[7] That report reads, in relevant part:

> [The FCA] is intended to protect the Treasury against the hungry and unscrupulous host that encompass it on every side, and should be construed accordingly. *It was passed on the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain.* Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

S. Rep. No. 99-345, at 11 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5266–67 (quoting *United States v. Griswold*, 24 F. 361, 366 (D. Oregon 1885)) (emphasis added).

viewed qui tam prosecutions as providing a means to achieve *rapid* exposure of fraud against the public fisc, unencumbered by the lack of resources or the bureaucracy inherent in enforcement by public authorities"). Congress's comparison between the "enterprising privateer" and the "slow-going public vessel" was meant to demonstrate not promptness, but rather, effectiveness.

The second animator of Petitioners' (and amici's) policy arguments is a presumption that relators will act in bad faith by delaying their claim filing in order to maximize damages. Pet'rs' Br. 28–29 (envisioning a "strong incentive . . . for relators to decline to disclose the fraud to the government" in order "to enhance their ultimate financial recovery—by keeping the Government in the dark," thus "permitting relators to intentionally delay up to *ten years* before filing"); Pet'rs' Br. 43 (stating "[t]olling rules are not intended to assist plaintiffs who . . . elect to 'sleep on their rights'") (internal citation omitted).

In fact, there are many valid and good-faith reasons why a relator may delay her filing, just as there are many why the Government may need to seek additional time to investigate a claim.[8] Once these two

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[8] For example, a relator may uncover the fraud years after it happens, such as when she assumes a new accounting role and finally accesses the documents that show irregularities. She may not know the FCA exists; she may hesitate because she fears retaliation. She may be deployed overseas and be unable to pursue domestic litigation from afar, or she may have engaged in a proffer

unfounded presumptions are stripped away, what remains is Congress's stated goal of stopping fraud and its clear efforts to permit maximum recovery while simultaneously disincentivizing game-playing in the process. Taken together, they show that the language Congress chose for § 3731(b)(2) vindicates all of its stated goals. As detailed below, they undermine Petitioners' and amici's parade-of-horribles policy arguments.

First, Petitioners claim that if relators are allowed resort to § 3731(b)(2) they will "have a longer period to sue than the government in some scenarios." Pet'rs' Br. 26. Perhaps, but only rarely, for two reasons. First, whistleblowers are often actively involved in supplying the Government's actual or constructive knowledge. *See* 31 U.S.C. § 3731(b)(2) (additional three-year period triggered from when the Government knew or "should have known"). They either provide the requisite first-hand reporting directly to the "official of the United States charged with responsibility to act in the circumstances," 31 U.S.C. § 3731(b)(2), or to an agency employee who takes it up the chain of command. *See* 132 Cong. Rec. S11, 238 (1986) (Senator Grassley explaining amendments and stating that "care should be taken to assure that the information has reached an official in a position both to recognize the existence of a possible violation of this act and to take steps to address it"). Or, whistleblowers can provide the necessary corroboration if the Government suspects fraud in the

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agreement with the Government that prevents her from pursuing a civil action until the conclusion of a criminal case.

first instance. *See id.* (Senator Grassley noting that "courts should be leery of finding that the Government had knowledge of the existence of a possible cause of action based merely upon the discovery of irregularities that fall short of a concrete suspicion that fraud has occurred" and "[s]ome corroborative information to support that suspicion should be required").

If that whistleblower wants to become a relator, then she knows she has three years from the time she informed the Government to file her suit. If the fraud is known by more than one person and the initial whistleblower opts not to file a *qui tam* lawsuit, then theoretically the relator who brings suit would get the free pass of which Petitioners and their amici complain.

But that would be rare, for the second reason: a relator who opts to delay past the six-year default statute of limitations without ever contacting the Government would be barred from suit under (b)(1). *See supra* I.B.1. And any relator who delays still risks that her suit would be preempted by a Government suit, public disclosure, or another whistleblower. *See* 31 U.S.C. §§ 3730(e)(4)(A)–(B), (b)(5) (first-to-file, original source, and public disclosure provisions).

Petitioners aver that because DOJ did not issue its "Relator Share Guidelines" until December 1996, "[t]he possibility that a reduced award would deter delay by relators could not have informed Congress's decision-making [in 1986] about whether to make Section 3731(b)(2) available to relators" in non-intervened cases. Pet'rs' Br. 32. Petitioners are mistaken. "In

crafting provisions [in 1986] that specify the relator's recovery and in amending the jurisdictional provisions, Congress attempted to 'walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior.'" *United States ex rel. DeCarlo v. Kiewit/AFC Enters.*, 937 F. Supp. 1039, 1046 (S.D.N.Y. 1996), quoting *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994). Well before the issuance of the Guidelines, courts construed the maximum relator's share under § 3730(d), authored by the 1986 Congress, as being available for "only those individuals whose conduct in disclosing the fraud is virtually flawless," and held that the relator's share should be reduced when he delays reporting the fraud. *United States v. General Elec.*, 808 F. Supp. 580, 584 (S.D. Ohio 1992), *aff'd in relevant part*, 41 F.3d 1032 (6th Cir. 1994).

Not only did Congress envision whistleblower involvement when enacting § 3731(b)(2), it also can be presumed to have been aware of these disincentives to relator delay and to have drawn its lines accordingly. That a rare relator might be able to dodge these barriers to relief may well have been acceptable to Congress if the line drawn vindicated the overarching goal of halting fraud and recouping lost monies. Policy line-drawing, however arbitrary, is solely an exercise for Congress, not the judiciary. *Unexcelled Chem.*, 345 U.S. at 63-64; *accord Abramson*, 456 U.S. at 640–41 (O'Connor, J., dissenting).

Petitioners' and amici's remaining policy arguments merit little discussion. Their claim that relators

could use § 3731(b)(2) to "[maximize] damages from the ongoing misconduct," Pet'rs' Br. 28–29, is a charge that could equally be leveled at the Government because it can reap thrice what it loses. Yet that did not halt Congress from enacting § 3731(b)(2) to enlarge the amount of time available to pursue fraud, including against those who choose to engage in "fraudulent activity that spans a number of years." *See* Pet'rs' Br. 29, n.6.

Amicus Washington Legal Foundation ("WLF") laments that FCA defendants remain in the dark about the allegations for years. This does not square with the realities of FCA investigations. Br. for Amicus Curiae WLF at 12, 14, 16. While FCA defendants are not served with the complaint while the case remains under seal, 31 U.S.C. § 3730(b)(2), defendants frequently receive substantial notice of the claims against them. As WLF acknowledges, the Government often uses the seal period to engage in discovery (interviews, depositions, and written discovery) or settlement negotiations, which should further elucidate for the defendants the basis of the claims. Br. for Amicus Curiae WLF at 12, 14. In short, defendants often have informal notice of the existence and substance of the *qui tam* complaint, which undercuts amicus's claim that applying § 3731(b)(2) to relators will lead to rampant due process violations. *See, e.g.*, *Baylor University Med. Ctr.*, 469 F.3d at 270 n.8 (acknowledging that during the time under seal "some of the hospitals in this case received partial (and largely informal) notice of the existence and substance of [the *qui tam* complaint]"); *see*

also Br. for Amicus Curiae WLF at 15 (citing *United States ex rel. Costa v. Baker & Taylor, Inc.*, 955 F. Supp. 1188, 1189 (N.D. Cal. 1997)) (acknowledging that district courts have the power to lift the seal against the Government's wishes).

In short, the policy arguments as framed by Petitioners and amici provide little aid to the Court in resolving the question presented. Such arguments are not relevant when the plain language governs. *See supra* Section I.A.; *see also Unexcelled Chem.*, 345 U.S. at 64. And even if policy arguments serve a purpose when resolving ambiguities, the positions offered here do not. They are founded on a presumption that the Government and relators act only in bad faith, and attribute to Congress an overarching purpose it did not adopt (promptness) while downplaying the purpose that all agree was the Act's impetus: effectively stopping fraud and securing the recovery of Government funds.

II. RELATORS ARE NOT AND DO NOT AT ANY POINT BECOME "OFFICIALS OF THE UNITED STATES" UNDER THE PLAIN LANGUAGE OF THE ACT.

Petitioners' alternative argument is that if § 3731(b)(2) applies to relators, then this Court should rewrite that subsection to end with "or by the relator when the Government declines to intervene." Congress could have added these words, but it did not. And, to be clear, such a wholesale rewrite of the statutory

language is the only way to achieve the result Petitioners urge. That is because Petitioners' selective version of the "stand in the shoes" rationale, Pet'rs' Br. 41, does not render relators and the Government interchangeable all of the time, but rather only in declined suits. The plain language—Congress's deliberate choice—should govern.

Turning to this plain language, three phrases in the relevant provision establish its meaning. First, (b)(2)'s discovery-based rule is triggered on the knowledge of "the official of the United States." 31 U.S.C. § 3731(b)(2). Many have concluded—based on the legislative history and actual practice—that this official is limited to the Attorney General (and his delegates). *See* Hesch Br. at 6–7 & n.7 (collecting authorities); *see also* S. Rep. No. 99-345, at 30 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5295 (stating that "[t]he statute of limitations does not begin to run until the material facts are known by an official within *the Department of Justice* with the authority to act in the circumstances") (emphasis added). Although the phrase "Department of Justice" was removed from the final version, that hardly means Congress decided to extend the language so broadly to include private relators who are not employed by the Government. Notably, Congress retained the specific terminology "official of the United States," as opposed to the generic term "government" or "United States" that it used elsewhere in the FCA. As shown above, *see supra* I.B.1, Congress used those latter terms in specific ways, some of which included relators and some that did not. An "official of

the United States" is yet another distinct concept, which indicates Congress intended something different here.

Second, and relatedly, section (b)(2) further qualified what type of "official of the United States" had the requisite knowledge: only one "*charged with responsibility to act*," 31 U.S.C. § 3731(b)(2) (emphasis added). The plain meaning of the term "charged" encompasses one who has been "entrusted" with the obligation to affirmatively perform some action. *See Charge*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("To entrust with responsibilities or duties."); *Charge*, OXFORD ENGLISH DICTIONARY 13.c (2d ed.) ("impos[ing] a duty, task, or responsibility upon" and "lay[ing] a command or injunction upon").

Likewise, § 3731(b)(2) triggers the limitations period based on the knowledge of the person who has a "responsibility to act." The word "responsibility" carries with it the concept of accountability or institutional hierarchy—that one who fails to carry out an assigned task must answer to whoever assigned the work. *Responsibility*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("That for which one is answerable or accountable; a trust, duty, or obligation."). For this reason, Petitioners' reliance on dictionary definitions of "official" and the definition of "public official" in the federal bribery statute, *see* Pet'rs' Br. 41 (citing 18 U.S.C. § 201(a)(1)), actually undermines their position. As those definitions reflect, they encompass only those who have been actively appointed to carry out a program or initiative for the Government.

The unique relationship between a *qui tam* relator and the Government in the context of a legal action does not accord with Petitioners' conception of "official." *See supra* Section I.B.1. The two often proceed in tandem through the lawsuit, and the Government always retains the ability to control the litigation. *See, e.g.*, 31 U.S.C. § 3730(c) (giving the Government the right to intervene, to dismiss the case over the relator's objection, and to intervene at a later date). In fact, Congress assigned the Government—and only the Government—duties that it cannot delegate to the relator. *See* 31 U.S.C. § 3730(a) ("The Attorney General diligently shall investigate a violation under section 3729."). And the Attorney General charged with pursuing the case has an obligation to "take care that the laws be faithfully executed" or face repercussions. U.S. Const. Art. II, § 3.

Thus, the mere fact of declining does not necessarily indicate that the Government has—or could—affirmatively appoint the relator to take its place. The Government might decline initially because the district court has refused to grant it the extensions it needs to "diligently investigate" under § 3729, but it can always continue its investigation and intervene later, § 3730(c). If the Government lacks the resources to ensure that the FCA is "faithfully executed," it may opt to decline, again with the option of intervening later. Neither of these scenarios displays the intent to appoint the relator, per Pet'rs' Br. 41, a "public official."

Third and finally, the FCA temporally limits this responsibility to act: "in the circumstances." 31 U.S.C.

§ 3731(b)(2). The only relevant circumstances in this context are the investigation and then the filing, intervening, or declining of the suit. But under Petitioners' approach, those circumstances would have come and gone by the time a relator assumes this role. The "springing" limitations problem identified above, *see supra* Section I.B.2., would apply equally here. Thus, far from "giving effect" to "default rules" regarding statutes of limitations and the "purposes animating" tolling rules, Pet'rs' Br. 42, Petitioners actively undermine them.

Other FCA provisions make sense only if the "official of the United States charged with responsibility to act" excludes relators. Section 3729(a)(2), for example, states that "[i]f the court finds that the person committing the violation of this subsection furnished *officials of the United States responsible for investigating* false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information," the damages to which that person is subjected are reduced. If this provision referred to the relator, it would lead to the quizzical result that an employer who tells an employee about a fraud would be liable for fewer damages if that employee later decided to become a relator. Congress could not have intended to retroactively confer the benefit of this cooperation provision on a fraudster who merely revealed this information to an employee who later happened to become the relator. Because § 3731(b)(2) uses the same phrase as § 3729(a)(2)—"official of the United States"—it should be taken in a similar vein. *See Envtl. Def. v.*

Duke Energy Corp., 549 U.S. 561, 584 (2007) (noting the "presumption that the same words repeated in different parts of the same statute have the same meaning") (Thomas, J., concurring).

Petitioners' argument, Pet'rs' Br. at 42–43, and the cases that have construed subsection (b)(2) to act as an equitable tolling provision, *see, e.g.*, *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1216 (9th Cir. 1996), undermine Congress's explicit purpose in enacting the 1986 Amendments: to reach and combat even more cases of fraud. *Hyatt* read in a limiting provision that would prevent relators from bringing otherwise meritorious claims—in effect, creating an equitable *un*tolling provision that bars a claim based on the relator's knowledge when the plain language of the statute otherwise would permit it. *Contra Equitable Tolling*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining equitable tolling as the "doctrine that the statute of limitations will not *bar* a claim if the plaintiff . . . did not discover the injury until after the limitations period had *expired*. . . .") (emphasis added).

Finally, coming full circle, Petitioners again complain of "counterintuitive results" that would arise from enforcing the statute as written. Pet'rs' Br. 45; *see also id.* at 44 (discussing "highly anomalous" outcomes). As set forth extensively above, *see supra* Section I.B.1., these so-called anomalies exist only because Petitioners divorce them from the FCA's purposes and the safeguards Congress selected to ensure that prospective relators would not engage in contumacious delay.

Similarly, Petitioners' intimation that adopting any view but theirs would reward dilatory relators and punish diligent ones ignores the many incentives that Congress built into the Act to prevent such results. *See* 31 U.S.C. § 3730(b)(5), (e)(4)(A)–(B). Putting aside these built-in statutory safeguards, Petitioners' solution would not remedy their own imagined problems. So long as the Government *may* intervene, relators could theoretically dally to bank larger recoveries. Then, they would not be equitably "untolled" if they won the Government-intervention lottery. In short, Petitioners' proposed solution—which turns on the Government's declining or intervening—arises well after a relator's timing decisions are made; it would not deter the delay of which they complain. Nor do the Petitioners address the greater likelihood of Government dallying. In either event, so long as suit is brought within ten years, stolen funds can be recouped.

Regardless, in invoking these "counterintuitive results," Petitioners, once again, do not claim statutory ambiguity, nor do they expressly invoke the absurdity or congressional impossibility exceptions to unambiguous language. *See supra* Section I.A. Instead, they simply insist that their preferred result is "compelled by the broader statutory context." Pet'rs' Br. 40. The same reasons provided above, *see supra* Section I.A., apply with equal force here: the Court should not interfere with Congress's unambiguous statutory language.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Eleventh Circuit.

Respectfully submitted,

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